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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 827

EDITH VANDEVOIR, PETITIONER,

vs.

SOUTHEASTERN GREYHOUND LINES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNEST M. WRIGHT,
FRANK R. MILLER,
ERNEST M. CAUSEY,
HOMER B. AIKMAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.

EDITH VANDEVOIR, PETITIONER,

vs.

SOUTHEASTERN GREYHOUND LINES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Supreme Court of the United States:

The petitioner, Edith Vandevoir, respectfully shows to this honorable court:

A.

Summary Statement of Matter Involved.

This action was brought to recover damages for personal injuries sustained by petitioner while a passenger on a bus of respondent. The injury occurred in the state of Tennessee.

Petitioner is a citizen of Indiana, purchased her transportation in Indiana and became a passenger of respondent in Indiana for transportation to a point outside Indiana.

Respondent is a corporation organized under the law of Kentucky; but transacting an extensive business in Indiana as an interstate carrier by virtue of a required certificate of

authority from Indiana, and has a designated resident agent in Indiana for the service of process.

Respondent filed motion for summary judgment on the ground it was a nonresident of the state of Indiana and the action, therefore, barred by an Indiana limitation statute (R. 5 and 12). After hearing on stipulation of facts, documentary and oral evidence, the trial court made its finding and conclusions (R. 26-42), and entered judgment against petitioner (R. 42). From this judgment petitioner appealed to the Circuit Court of Appeals of the Seventh Circuit and the summary judgment was affirmed. (R. 57, 58).

The trial court and the Circuit Court of Appeals decided respondent was a nonresident of Indiana because of the nonmigration doctrine.

B.

Jurisdiction.

1.

Petitioner contends this court has jurisdiction to review under Title 28, Section 347, Clause (a) of the Judicial Code, 48 Stat. 926; and Rule 38, Clause 5, of this court.

2.

The date of the judgment to be reviewed is November 30, 1945 (R. 57, 58).

3.

The decision conflicts with the following:

a.

Sixth Circuit. (Baltimore & O. R. Co. v. Reed, 223 Fed. 689, 697).

b.

Seventh Circuit (Dodge Mfg. Co. v. Patten, 60 Fed. 2d 676).

c.

Second Circuit. (Moss v. Atlantic Coast Line R. Co., 149 Fed. 2d 701).

d.

United States Supreme Court. (Woodworth, 111 U.S. 138; Taylor, 266 U.S. 200; Transportation Company, 292 U.S. 511; Neirbo, 308 U.S. 165; Shoe Company, 90 L. ed. 109; and Williams, Jan. 7, 1946).

e.

State policy as declared by legislative enactment on equality as between domestic and foreign corporations. (Burns Indiana Revision 1933, Section 25-302, Volume 6, page 60.)

State policy as declared by legislative enactment against fictions of law. (Burns Indiana Revision 1933, Section 2-1050, Volume 2, page 188; Section 49-1417, Volume 10, page 98).

f.

Applicable local decisions. (The New Albany and Salem R. R. Co. v. Haskell, 11 Ind. 301; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. The City of Indianapolis, 147 Ind. 292; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Harden, Treasurer, 137 Ind. 486).

g.

Weight of authority:

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McConnell v. Caribbean Petroleum Co., (1938) 278 N. Y. 189, 195; 15 N.E. 2d 573, 575;

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Thompson v. Texas Land & Cattle Co., (Texas-1893) 24 S.W. 856, 857.

C.

Question Presented.

The question presented is whether respondent having qualified to transact business in Indiana and having a resident

agent for the service of process, all as required by Indiana law, and transacting extensive business in virtue thereof, is a nonresident of Indiana within the meaning of the second clause of Section 2-606, Burns 1933 Revised Statutes of Indiana, Volume 2, Page 74. That section including its published heading is as follows:

> "*Nonresidence of defendant* or absence on public business not considered—*Exception* as to *nonresidence.*—The time during which the defendant is a *nonresident* of the state *or* absent on public business shall not be computed in any of the periods of limitation; but when a cause has been fully barred by the laws of the place where the defendant *resided*, such bar shall be the same defense here as though it had arisen in this state: Provided, That the provisions of this section shall be construed to apply only to causes of action arising without this state." (Italics supplied).

D.

Reasons for Writ.

Petitioner assigns as reasons for the writ the following:

I.

The Circuit Court of Appeals rendered a decision in conflict with a decision of the Sixth Circuit (Baltimore & O. R. Co. v. Reed, 223 Fed. 689, 697); also in conflict with a decision of its home circuit (Dodge Mfg. Co. et al. v. Patten, 60 Fed. 2d 676), which latter decision this court pronounced sound in the Neirbo Case, 308 U. S. 165; also, in conflict with a decision of the Second Circuit (Moss v. Atlantic Coast Line R. Co., 149 Fed. 2d 701).

II.

The Circuit Court of Appeals based its conclusion on certain decisions in conflict with the latest expressions of this court in the Neirbo Case, 308 U. S. 165, Shoe Company, 90 L. ed. 109, Williams, Jan. 7, 1946; also in conflict with previous decisions of this court; and undertakes to reestablish a discarded doctrine as to corporations, which makes it of great importance that this Court take jurisdiction and set the question at rest.

III.

The Circuit Court of Appeals has decided an important question of local law in conflict with state policy as declared by applicable local statutes against discrimination and fiction (Burns Revision of 1933, Section 25-302, Vol. 6, page 60; Section 2-1050, Vol. 2, page 188; Section 49-1417, Vol. 10, page 98); and likewise in conflict with applicable local decisions; and in conflict with the great weight of authority on limitation statutes as disclosed by state court decisions from Mississippi, New York, Missouri, Illinois, Iowa, Montana, Oklahoma, Tennessee, and Texas. The supporting brief carries citation to these authorities.

WHEREFORE your petitioner respectfully prays a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding the said court to certify and send to this court a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said cause of Edith Vandevoir v. Southeastern Greyhound Lines, being Cause No. 8758 of said court, to the end that said case may be reviewed and determined by this court as provided by the Judicial Code and that your petitioner may have such other or further relief in the premises as this court may deem appropriate and

that the judgment of the said Circuit Court of Appeals in said cause be reversed by this honorable court.

EDITH VANDEVOIR,

Petitioner.

By: ERNEST M. WRIGHT,

FRANK R. MILLER,

ERNEST M. CAUSEY,

HOMER B. AIKMAN,

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 827

EDITH VANDEVOIR, Petitioner,

vs.

SOUTHEASTERN GREYHOUND LINES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ERNEST M. WRIGHT,
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vs.

SOUTHEASTERN GREYHOUND LINES.
RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was rendered November 30, 1945. (R. 57, 58). The decision will be found in the record. (R. 54). At the time of preparing and filing this brief the opinion has not been officially reported.

II.

Jurisdiction.

1.

The provision of the Federal Code believed to sustain the jurisdiction of this court is Title 28, Section 347, Clause (a) of the Judicial Code, 48 Stat. 926; and Rule 38, Clause 5, of this court.

2.

The date of the judgment to be reviewed is November 30, 1945. (R. 57, 58).

3.

The decision in this case is in conflict with decisions of the Second, Sixth and Seventh Circuits; is in conflict with decisions of this Court; and in conflict with state policy and the weight of authority.

The involved question is one of general importance on corporate status as to residence or nonresidence in a foreign state where it has qualified to transact business. The extent of corporate activities beyond the chartering state requires that there be certainty and uniformity as to such status. This certainty and uniformity is important to every jurisdiction.

III.

Statement of the Case.

This action was brought to recover damages for personal injuries sustained by petitioner while a passenger on a bus of respondent. The injury occurred in the state of Tennessee.

Petitioner is a citizen of Indiana, purchased her transportation in Indiana and became a passenger of respondent in Indiana for transportation to a point outside Indiana.

Respondent is a corporation organized under the law of Kentucky; but transacting an extensive business in Indiana as an interstate carrier by virtue of a required certificate of authority from Indiana, and has a resident agent in Indiana for the service of process.

Respondent filed motion for summary judgment on the ground it was a nonresident of the state of Indiana and the

action, therefore, barred by an Indiana limitation statute (R. 5 and 12). After hearing on stipulation of facts, documentary and oral evidence, the trial court made its finding and conclusions (R. 26-42), and entered judgment against petitioner (R. 42). From this judgment petitioner appealed to the Circuit Court of Appeals of the Seventh Circuit and the summary judgment was affirmed. (R. 57, 58).

The trial court and the Circuit Court of Appeals decided respondent was a nonresident of Indiana within the meaning of an Indiana statute because of the non-migration doctrine, and that the action was barred by reason of such nonresidence.

The Indiana statute, including its published heading, is as follows:

> "*Nonresidence of defendant* or absence on public business not considered—*Exception* as to *nonresidence.*—The time during which the defendant is a *nonresident* of the state *or* absent on public business shall not be computed in any of the periods of limitation; but when a cause has been fully barred by the laws of the place where the defendant *resided*, such bar shall be the same defense here as though it had arisen in this state; Provided, That the provisions of this section shall be construed to apply only to causes of action arising without this state." (Italics supplied).

IV.

Specification of Errors.

Petitioner maintains the respondant is a resident of Indiana within the meaning of such statute and that the judgment of the Seventh Circuit should be set aside because of its conflicts, and because of the uncertainty and lack of uniformity it creates as to corporate status in a foreign state.

1.

There is conflict with a decision of the Sixth Circuit (Baltimore & O. R. Co. v. Reed, 223 Fed. 689, 697); the home circuit (Dodge Mfg. Co. v. Patten, 60 F. 2d 676), which latter decision this court pronounced sound in the Neirbo Case, 308 U. S. 165; also, conflict with a decision of the Second Circuit (Moss v. Atlantic Coast Line R. Co., 149 Fed. 2d. 701).

2.

The Circuit Court of Appeals based its conclusion on certain decisions in conflict with the latest expression of this court in the Neirbo Case (308 U. S. 165) and now Shoe Company (90 L. ed. 109) and Williams (Jan. 7, 1946); also in conflict with Woodworth (111 U. S. 138); Taylor (266 U. S. 200) and Transportation Co. (292 U. S. 511); and undertakes to reestablish a discarded fiction as to corporations.

3.

There is conflict with state policy as declared by applicable local statutes against discrimination and fiction (Burns Revision of 1933, Section 25-302; Vol. 6, page 60; Sec. 2-1050, Vol. 2, page 188; Section 49-1417, Vol. 10, page 98); conflict with applicable local decisions; and conflict with the great weight of authority on limitation statutes as disclosed by decisions in Mississippi, New York, Missouri, Illinois, Iowa, Montana, Okahoma, Tennessee and Texas.

V.

Summary of the Argument.

The sole question is that of residence, not citizenship, of a foreign corporation qualified and transacting business in Indiana within the meaning of an Indiana limitation statute.

The terms residence and citizenship are not synonymous. The involved statute does not use the term citizenship. Residence is the status to be determined.

Petitioner contends respondent having qualified to transact business in Indiana, having an agent for the service of process, having a place of business and doing a very substantial business in Indiana is not a nonresident within the meaning of the statute.

The Sixth Circuit has interpreted the first clause of this Indiana statute and that decision is contrary to the instant decision. The instant decision is based on the non-migration fiction which puts it in conflict with the Second and Seventh Circuit, in conflict with this Court in Neirbo and other cases, against the public policy of the State of Indiana as to discrimination and fiction, and contrary to the great weight of authority. Nine states have held that within the meaning of a limitation statute foreign corporations qualified within a state are not nonresidents.

VI.

ARGUMENT.

a.

Sixth Circuit.

The Sixth Circuit (Baltimore & O. R. Co., v. Reed, 223 Fed. 689, 697) construed the first clause of the involved section as to a railroad foreign corporation and held:

> "The conclusion is inevitable that it was competent at all times for the plaintiff below to have sued the company in Indiana, and that, on the authority of McCabe v. Illinois Central Railroad Co., Southern Railway Company v. Mayes, and Tiller v. St. Louis & Santa Fe Railroad Co., supra, the defendant below was *not a nonresident, as that term is used* in section 298, Burns, providing that the period of absence 'shall not be computed in any of the periods of limitation.'" (Italics supplied)

This holding is in harmony with state courts of appeal as set out under item "g" following.

In the instant case the Seventh Circuit holds a bus line foreign corporation is a nonresident under the second clause.

Each clause of Section 2-606 deals with the same status. Consistency with physical structure, wording and state policy requires the construction that a resident within the meaning of the first clause is a resident under the second. If fact prevails over the non-migration fiction in the first clause, as in the Reed and other cases, then this same fiction must give way to fact under the second. The Seventh Circuit in Sheldon etc. Corporation v. Commissioner, 118 Fed. 2d 835 at page 836 recognizes this principle:

> "It may be conceded that a corporation in certain respects is a fiction, but certainly it would not be equitable

> to treat this corporation *as a fact* as against the creditors and *a fiction* against the Government." * * * (Italics supplied)

The word "but" as commonly used means "except". A statutory exception is a restriction on the operation of the statute. Gatliff Coal Co. v. Cox, 142 Fed. 2d 876, 882. The second clause being an exception to the first is therefore dealing with the same status.

Also, the companion words "non-resident" in the first clause and "resided" in the second presumptively carry the same meaning. Ryan v. State, 174 Ind. 468, 474.

In addition, it is state policy that there be no discrimination in favor of a foreign corporation as against a domestic corporation. Burns 1933, Section 25-302. This section declares general equality, not discrimination, when foreign corporations qualify in the state. Neirbo (page 172) refuses to presume discrimination in favor of a foreign corporation.

Since residence is measured by the same standard in each clause, the decision in the instant case is in conflict with the Sixth Circuit.

b.

Seventh Circuit.

There is conflict in principle with the Dodge Case, 60 Fed. 2d 676 of the Seventh Circuit. The Dodge Case dealt with a Federal venue statute which requires suit in the district of the "residence" of one of the parties; and held a Delaware corporation qualified and doing business in Indiana was a resident. Of the Dodge Case this Court (Neirbo) said:

> "We deem this practice sound, and it controls the present case."

c.

Second Circuit.

The instant decision meets conflict with the Second Circuit, the Circuit of the Neirbo Case. That Circuit did not deal with a limitation statute, but in Moss v. Atlantic etc. Co., 149 Fed. 2d, at 701, said:

> "In Neirbo v. Bethlehem Shipbuilding Corporation, Inc., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, the Supreme Court held, that, when a foreign corporation had in another state given a consent to be sued, it became a '*resident*' within Section 112." (Italics supplied)

d.

United States Supreme Court.

The instant decision is based on the non-migration idea which after a varied career met its finality in Neirbo. And still later a further rebuff in Shoe Company and Williams. Certain cases are cited in the instant opinion which support the non-migration idea, but there is no discussion of other decisions of this court which reject it.

As early as 1883 this court commenced to look differently at foreign corporations. In New England etc. Co. v. Woodworth, 111 U. S. 138, a foreign corporation doing business in Illinois was held to be a resident of that state so as to support the appointment there of an administrator. In this decision reference is made to corporate activities in other states and, after concluding there was residence in Illinois for the purpose just mentioned, it is said:

> "Nor is there anything inconsistent with this view in the fact that, as a Corporation of *Massachusetts*, the de-

fendant removed the suit from the state court on the ground of diversity of *citizenship.*" (Italics supplied).

Thereby recognizing citizenship in Massachusetts for removal purposes and a residence in Illinois for another purpose.

This decision was cited by Justice Cardozo while on the New York bench in support of one of the decisions mentioned under item "g" following. The principle of the Woodworth decision, although not cited, was carried forward by Justice Cardozo in his opinion, without a dissent, in International Milling Co. v. Columbia Transportation Co., 292 U. S. 511. In Transportation Co. at bottom of page 518 reference is made to the Taylor Case as follows:

> "The opinion pointed out (1) that for anything made to appear the negligence of the connecting carrier may have occurred in Missouri where the goods were to be delivered, and (2) that '*the plaintiff consignee is a resident of Missouri—that is, has a usual place of business, within the state.*' " (Italics supplied.)

And while referring to the Shaw and Seaboard Cases as supporting the proposition that for many purposes corporate "domicile" is in the chartering state, these decisions were not followed on the question of residence. The corporation under consideration by Justice Cardozo in Transportation Co. was characterized as follows:

> "In a very *real* and *practical* sense, it is a *resident* of the forum like the plaintff in the Taylor Case, (266 U. S. 200, 207) who was *domiciled* in one state and *resided* in another." (Italics supplied.)

The plaintiff in the Taylor Case was "a Delaware corporation with a usual place of business in Missouri." The question before the Court in Transportation Co. and Taylor was one of asserted interference with interstate commerce; but the ques-

tion of residence was an element considered. In each of these cases the corporation was looked at as it actually was; and as in Neirbo "classics" and "metaphor" gave way to reality. Included in language used in the Taylor Case is the following:

> "The American Fruit Growers Inc., a *Delaware corporation* with a *usual place of business in Missouri,* brought an action * * *
>
> "Here, the *plaintiff* consignee is a *resident* of Missouri,—*that is,* has a *usual place of business within the state;* * * *" (Italics supplied.)

The Taylor decision by Justice Brandeis, and like Justice Cardozo without a dissent, was in 1924; Seaboard, 1926; and Transportation Co. in 1934.

The Seaboard Case, cited in support of the instant decision follows on the heels of Taylor but goes back of it and seeks support in Keasley, and a kindred case, of which proper disposition is made in Neirbo.

This non-migration fiction as petitioner believes originated in a dictum in the Earle Case, 13 Peters 519, where the only thing for decision was the legality of a transaction in a foreign state. The decision was that the transaction was legal, thereby upholding migration so far as the transaction of business is concerned. This was a decision in 1839, quite likely in advance of legislation in many states by which foreign corporations were admitted, and far in advance of present day corporate activities. Also, at a time when there was still some uncertainty as to corporate citizenship for jurisdictional purposes. Marshall Case (1846), 16 Howard 314.

The language in the Earle dictum is to be observed. It is said corporations exist by force of law and where the law ceases to operate, the existence ceases. This is the foundation

for the non-migration idea. It perhaps is sound so far as the law of the chartering state can empower existence beyond its boundary. But it sustains migration in the adjoining state which by legislation gives existence there.

It is definitely inaccurate to say a corporation has no existence except in its chartering state. This requires a disbelief in your own eyes when you read the signs at bus and railroad stations, on store windows and observe the activities there. Reason, reality and certainty in corporate status join in the requirement that in harmony with Woodworth, Taylor, Transportation Company, Neirbo, Shoe Company and Williams, it definitely be settled that a corporation, though a citizen of its chartering state only, has residence in any other state which gives existence within its jurisdiction.

The Harris Case, cited in the instant decision in support of non-migration, carries language at variance with the non-migration fiction. It is said:

> "A corporation is in law, for civil purposes, deemed a *person*. It may sue and be sued, grant and receive, and do all other acts not ultra vires which a natural person could do." (Italics supplied.)

Under Indiana law and likewise other jurisdictions (Croop, 199 Ind. 262, 270) an individual may have citizenship in one state and residence in another.

And this same Harris Decision carries further language which is inconsistent with non-migration:

> "But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all *respects* as if it had been an *independent corporation of the same locality.*" (Italics supplied).

While the non-migration fiction is repeated in the text of the decision, the conclusion reached is based on reality.

It is not wholly unfounded to say that there may have been inaccuracy in the use of the word residence in some of the cases. Citizenship and residence were distinguished by this court so far back as 1798 (3 Dal. 382) and continuously thereafter, including Donaldson (268 U. S. 398, 399). The Francis Case (78 U. S. 210, 216) cited in support of the instant decision confuses the terms. There the only question was citizenship under the jurisdiction statute.

e.

State Policy.

The instant decision construes an Indiana statute in conflict with state policy in two particulars.

The construction results in discrimination against a domestic corporation because as against them there is two years in which to sue. The respondent is given a special privilege of a one year limitation statute of another state and that as against a citizen of Indiana, who bought transportation and took passage in Indiana. Burns 1933, Section 25-302 declares for equality.

State policy as to fiction also is violated. Section 2-1050 provides:

> "All *fictions* in pleading are *abolished*, and their use forbidden in the courts of justice in this state." (Italics supplied).

A further condemnation of fiction is Section 49-1417, where it is provided:

> "No officer of this state, county, township or other officer, shall ever tax up, charge, receive or suffer to be

taxed up, or receive in such office, under color of such office, any fee or sum of money for services contemplated to exist only by legal *fiction.*" (Italics supplied).

As to such state policy this court spoke in the Blackstone Case (188 U. S. 189). At page 206 it is said:

"When *logic* and the *policy of a state* conflict with a fiction due to historical tradition, the *fiction* must give way." (Italics supplied).

In Miami Coal Co. v. Fox, Treasurer, 203 Ind. 99, Indiana rejected the fiction mentioned in the Blackstone Case (mobilia sequuntur personam) and denied the right to tax an Indiana corporation in Indiana on property which had acquired a business situs in Illinois.

f.

Local Decisions.

The instant decision also conflicts with the reasoning of Indiana decisions on the question of corporate residence.

The Haskell Case, 11 Ind. 301, speaking of a domestic railroad under the Indiana venue statute at page 303 says:

"Again, we are referred to Sec. 33 of the same act, which says that, 'In all other cases, the action shall be commenced in the county where the defendants, or some one of them, has his usual place of *residence.*' 2 R. S. p. 34. Even if this provision is at all applicable to railroad corporations, which is doubtful, it would not be an unfair construction to say, that such corporations may be regarded as *resident in each county* in which they have an office or agency, or an officer or agent upon whom process may be served." (Italics supplied).

In harmony with this are Pittsburgh etc. Railroad Co. v.

Indianapolis, 147 Ind. 292, and Pittsburgh etc. Railway Co. v. Harden, 137 Ind. 486. In the former at page 295 the court says:

> "The authorities to which counsel refers have relation, for the chief part, to the *domicile* of corporations. In *general*, the *domicile* of a corporation is in the state from which it receives its charter; though a railroad company *having its road* in two or more states, but being one corporation, with one management and board of directors, may be said to be a separate corporation *in each of said states*, and governed as to its property in each state by the laws thereof." (Italics supplied).

Substantially the same language will be found at page 492 of the Harden Case.

It is true that in the Indianapolis Case there are quotations from a text writer which carry the non-migration idea in a none too accurate manner, but the language of the court itself as above quoted shows what was in the mind of the court.

It is also true that the McDonough Case, 164 Ind. 321, cited in the instant decision, carries a general statement that "a corporation can have no legal existence beyond the boundaries of the sovereignty which created it, * * *". Citing among others the Earle Case and the Schollenburger Case. The question of residence in a foreign state by virtue of qualification there was neither decided nor discussed. While the general statement is that an Indiana corporation can have no legal existence beyond Indiana, yet the decision recognizes an existence in Pennsylvania and upholds a judgment there against the corporation.

The Haskell Case is significant when compared with two Illinois decisions. The Bristol Case, 15 Ill. 436, speaks of a domestic railroad as does the Haskell Case. And the Bristol

Case is cited later in Illinois (307 Ill. 45, 49) in support of the proposition that a foreign corporation doing business in Illinois is not a nonresident within the meaning of the Illinois attachment statute.

Before going to state court decisions which deal directly with limitation statutes it is of some consequence to observe that Kentucky, the chartering state of the respondent, holds a foreign railroad with but a spur track running across the river into Louisville is a resident of Kentucky within the meaning of the Kentucky venue statute. Knight v. Pennsylvania R. Co., 264 Ky. 412, 417-418; 94 S. W. 2d 1013, 1015-1016 (1936). Kentucky rejects fiction and follows fact.

g.

Weight of Authority.

The instant decision cites in support of the non-migration idea an Oregon Case, Hamilton v. North Pacific etc. Co., 164 Pac. 579. The statute there involved provides in part as follows:

> "When the cause of action has arisen in another state * * * *between nonresidents of this state*, and by the laws of the state, * * * where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." (Italics supplied).

As this language indicates and as the court at page 582 says:

> "The purpose of the Legislature in enacting the statute was to remove any possible encouragement which might otherwise be offered for the bringing in the Oregon court of litigation which more *properly belongs elsewhere.*" (Italics supplied).

Thus it was sought to defeat litigants coming to Oregon and litigating claims which had lapsed before their coming. The

petitioner here was both a citizen and resident of Indiana. She purchased her transportation and took passage here. She did not come to Indiana to revive a lapsed cause. She should not be denied recovery as against a foreign corporation, when no such denial would exist as to a domestic. The legislature intended no such discrimination in favor of the foreign corporation.

The Oregon court undertakes to distinguish a Mississippi case and a Kentucky case which are characterized as supporting an opposite doctrine, and of this Mississippi case remarks:

> "* * * the Mississippi statute is wholly unlike the Oregon statute."

So far as the Mississippi statute bears on the question of residence of a foreign corporation the purport is the same. And neither does the Mississippi statute provide, as the Oregon case states, that it shall not apply to a corporation doing business in two or more states at the same time.

And it must be further noted that this Oregon Case is based on fiction. Referring to that of mobilia sequuntur personam and citing the Shaw Case in support of the non-migration idea.

The Mississippi Case (Louisville etc. Co. v. Pool, 72 Miss. 487, 16 So. 753) construing a statute of similar import to Indiana and involving similar facts definitely upholds this petitioner's position, and remarks as follows:

> "But a corporation may, for many purposes, be resident in many states at one time; * * *"

Consistent with this Mississippi Case will be found decisions from New York, Missouri, Illinois, Iowa, Montana, Oklahoma, Tennessee and Texas.

> McConnell v. Caribbean Petroleum Co., (1938) 278 N. Y. 189, 195; 15 N. E. 2d 573, 575;

Comey v. United Surety Co., (1916) 217 N. Y. 268, 274; 111 N. E. 832, 834;

Sidway v. Missouri Land & Live Stock Co., (1905) 187 Mo. 649, 673; 85 S. W. 150, 156;

Pennsylvania Company v. Sloan, (1878) 1 Ill. App. 364, 372;

Wall, Adm'r. v. Chicago & N. W. Ry. Co. (1886) 69 Iowa 498, 499-501; 29 N. W. 427, 428;

King v. National Mining and Exploring Co., (1881) 4 Mont. 1, 5-7; 1 Pac. 727, 730-731;

St. Louis etc. R. Co. v. Taliaferro (1917) 67 Okla. 37, 38-39; 168 Pac. 788, 789;

Turcott v. Yazoo & M. V. R. Co., (1898) 101 Tenn. 102, 108; 45 S. W. 1067, 1068-1069;

Thompson v. Texas Land & Cattle Co., (Texas-1893) 24 S. W. 856, 857.

In each of these cases the courts speak of the residence of foreign corporations with reference to limitation statutes. All these decisions hold a foreign corporation is a resident within the meaning of limitation statutes.

The late New York case (McConnell, 278 N. Y. 189, 195; 15 N. E. 2d 573, 575) will serve to demonstrate:

> "For the purposes of the Statute of Limitations this defendant is not a nonresident."

Citing in support a Cardozo decision (Comey, 217 N. Y. 268, 274-275). In the Comey Case Justice Cardozo dealt with a foreign corporation doing business in New York, and used the following language:

> "* * * but it owes to the laws of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a

> domestic corporation. * * * Its presence here is 'not temporary, but continuous', and under the authority of our laws."

Citing in support New York cases and the Woodworth Case (111 U. S. 138), and then holding that a foreign corporation qualified to transact business in New York is not a nonresident within the meaning of the limitation statute.

This same Justice while on the New York bench (Diehl, 216 N. Y. 57, 63-64) dealt with a foreign corporation under another New York statute and spoke as follows:

> "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state and transacts its business here, it must yield obedience to our laws. * * * For many purposes the fiction of its residence in the state of its origin must then be disregarded."

And as previously stated under item "d", this thought was carried forward to the Supreme Court in Transportation Co. and has recent vindication in Neirbo, Shoe Company and Williams.

CONCLUSION.

In view of the holdings of this court, also the Second, Sixth and Seventh Circuits, and the great weight of state authority, all of which declare against the non-migration fiction; in view of state policy; correct statutory interpretation; and in the interest of uniformity and certainty the writ should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 827

EDITH VANDEVOIR,

Petitioner,

vs.

SOUTHEASTERN GREYHOUND LINES,

Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 827.

EDITH VANDEVOIR,

Petitioner,

vs.

SOUTHEASTERN GREYHOUND LINES,

Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner's statement of the case is essentially correct except for the following omissions and inaccuracies.

In addition to being incorporated under the laws of the State of Kentucky, the respondent has its home office and principal place of business located in that state (R. 26). Its business is that of a common carrier of passengers and it has a Certificate of Authority to operate an interstate motor vehicle transportation system in Indiana (R. 27, 28, 30 to 39) and has appointed an agent in Indiana for

service of process (R. 28). It has not qualified as a foreign corporation to transact intra-state business within the State of Indiana.

At Evansville, Indiana it has a garage, a local manager and a number of employees to service its busses (R. 14). All advertising, ticket selling, loading and unloading of passengers and baggage and general contacts with the traveling public are handled through a separate terminal corporation at Evansville (R. 40, 41).

Respondent's motions for summary judgment addressed to each paragraph of the complaint are based upon the grounds that the cause of action sued upon in Indiana is barred by the one year limitation statute of the State of Kentucky where the defendant resided, by reason of the second clause of Section 2-606, Burns Indiana Statutes 1933 inasmuch as the action was one arising outside of Indiana (R. 5, 12). The statement of petitioner in the petition and brief to the effect that respondent's motion for summary judgment is based upon the grounds that the cause of action is barred by an Indiana limitation statute is inaccurate.

ARGUMENT.

Respondent discusses petitioner's specifications of error in the order in which they are presented in petitioner's brief. The Seventh Circuit held in the case at bar (*Vandevoir* v. *Southeastern Greyhound Lines*, 152 Fed. 2d 150) that the respondent is a resident of the State of Kentucky within the meaning of the second clause of Section 2-606, Burns Indiana Statutes 1933 because it was incorporated in Kentucky notwithstanding that the respondent operated an interstate motor vehicle transportation system in Indiana where the cause of action sued upon was brought.

The second clause of Section 2-606, Burns Indiana Statutes 1933 provides that:

> "* * * when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defense here as though it had arisen in this state: Provided, That the provisions of this section shall be construed to apply only to causes of action arising without this state."

Being a Kentucky corporation and residing in that state only, the court held that the one year limitation statute (Section 413.140 Ky. Rev. St. 1942) barred the cause of action which arose in the State of Tennessee.

I.

There Is No Conflict Between the Seventh Circuit's Decision in the Case at Bar and Decisions of Other Circuits and of This Court.

(Sections a, b, c, and d, Petitioner's Argument, Pet. Br. Pp. 6 to 12.)

Among the grounds for review asserted by petitioner it is contended that the decision of the Seventh Circuit conflicts with a decision of the Sixth Circuit in *Baltimore and Ohio Railroad Company* v. *Reed,* 223 Fed. 689. The latter case did not involve a construction of the second clause of Section 2-606, Burns Indiana Statutes 1933 but did construe the first clause of the same section of the statute which reads:

> "The time during which the defendant is a non-resident of the state or absent on public business shall not be computed in any of the periods of limitations • • •."

The petitioner argues that whatever interpretation is applied to the term "non-resident" as used in that portion of Section 2-606, Burns Indiana Statutes 1933 is equally applicable to the words "place where the defendant resided" used in the second clause of the same section of the Indiana Statute. The Sixth Circuit held that the defendant in that case was not a non-resident of Indiana within the meaning of the first clause of Section 2-606, Burns Indiana Statutes 1933 because the defendant was at all times amenable to process. No such question is involved in the case at bar.

It is granted that identical words used in different parts of the same statute may ordinarily be presumed to have been intended to have the same meaning. This presump-

tion however is not rigid and readily yields whenever there is such a variation in the connection in which the words are used as reasonably warrants the conclusion that they are employed in different parts of the same act with different meanings. Where the subject matter to which identical words used in different parts of the same statute refer is not the same in the several places where the words are used, or where the conditions are different, the meaning may well vary to meet the purposes of the law to be arrived at by a consideration of the language in which those purposes are expressed and of the circumstances under which the language was employed.

> *Atlantic Cleaners & Dyers* v. *United States of America,* 286 U. S. 427, 433, 76 L. Ed. 1204, 1207.

The first clause of Section 2-606, Burns Indiana Statutes 1933 provides for the tolling of the periods of limitation established by the Indiana Statutes while the defendant is a non-resident of Indiana or absent on public business. The second clause of the same section relates solely to the statutes of a foreign jurisdiction, *i. e.,* "the place where the defendant resided", and creates as a defense in those actions arising beyond the borders of Indiana, the bar of the laws of such foreign jurisdictions. It is quite apparent that the two clauses are each solely unrelated to the other and each is applicable to entirely different situations and the language used in either one can not be interpreted in the same sense in which it is used in the other.

The language "the place where the defendant resided" used in the second clause of the Indiana statute is wholly meaningless except when construed and interpreted as referring to a single state or jurisdiction and as contemplating that a foreign corporation can reside only in

the state of its incorporation. If construed as the petitioner contends, the statute is impracticable of operation for the reason that it would be impossible to determine which jurisdiction should be accepted as the place where a non-resident defendant corporation should be deemed to reside where it carries on its business operations in more than one jurisdiction or in jurisdictions other than the state of its incorporation.

While the petitioner cites *Ryan* v. *State*, 174 Ind. 468, 474 as authority in support of the petitioner's contention that the words "non-resident" used in the first clause of Section 2-606, Burns Indiana Statutes 1933 carries the same meaning as the words "the place where the defendant resided" used in the second clause, it is submitted that the cited case is exactly opposed to the petitioner's contention. The Supreme Court of Indiana in that case said:

> "It is a rule of statutory construction that when the same word or phrase is used more than once in the same section of an act, and the meaning is clear as used in one place, it will be construed to have that meaning wherever used in said act or section, unless there is something therein to show that there is another meaning intended."

In applying the quoted rule the Indiana court held that the words "written" and "in writing" appearing in different sections of the Indiana Statute under consideration could not be construed as having the same meaning because such a construction was plainly repugnant to the intent of the legislature.

The rule of the Ryan case lends further support to respondent's position that the terms in question under the Indiana Act can not be construed as having the same meaning.

The point made by the petitioner to the effect that the

7th Circuit's decision in the case at bar is in conflict with a prior decision of that court in *Dodge Mfg. Co. et al.* v. *Patten*, 60 Fed. 2d 676 even if sound does not constitute grounds for review by certiorari under Rule 38 (5) of the Rules of the Supreme Court.

It is further asserted by petitioner that a conflict exists between the Seventh Circuit's decision in the case at bar and the decision of the 2nd Circuit in *Moss* v. *Atlantic Coast Line R. Co.*, 149 Fed. 2d 701 and the decision of this court in *Nierbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 60 S. Ct. 1, 84 L. Ed. 167. The Nierbo decision relied upon by the 2nd Circuit does not repudiate the rule that a foreign corporation is a citizen or resident only of the state of its incorporation for purposes of jurisdiction. In this decision it was held that by designating an agent to receive process the foreign corporation being a non-resident of the district where suit is brought, consented to be sued there and waived any objections to venue. That this is the extent of the Court's holding in the Nierbo case is clearly recognized in this Court's decision in *Mississippi Publishing Corporation* v. *Murphree* (January 2, 1946) 90 L. Ed. 207 (Adv.). The very basis of the Court's decision in the Nierbo case is that a foreign corporation can not reside in a district other than that wherein it was incorporated. Otherwise there would be no occasion to hold that by designating an agent for process it is held to have waived any objections to the venue of a cause in a district foreign to where it was incorporated.

This Court in *Mississippi Publishing Corporation* v. *Murphree* (January 2, 1946) 90 L. Ed. 207 (Adv.), reaffirms the doctrine that a corporation can have its legal residence only in the state of its incorporation and cites with approval some of the decisions relied upon by the Seventh Circuit in its decision in the case at bar, *i. e.*, *Ex*

parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; *Seaboard Rice Milling Company* v. *Chicago R. I. & Pac. Ry. Co.,* 270 U. S. 363, 366, 70 L. Ed. 633; *Baltimore & O. R. Co.* v. *Harris,* 12 Wall. (U. S.) 65, 20 L. Ed. 354.

II.

There Is No Conflict in the Seventh Circuit's Decision With State Policy or Local Decisions.

(Sections e and f, Petitioner's Argument, Pet. Br. P. 12 to 15.)

The petitioner's assertion that the decision of the Seventh Circuit is in conflict with state policy presents no grounds for review by certiorari (Rule 38 (5) Supreme Court Rules) and is wholly without merit there being no citation of any authority in point.

Contrary to statements found in petitioner's brief under point "f", pages 13, 14 and 15, the Indiana Supreme Court is in accord with the decision of the Seventh Circuit with respect to the place of residence of a foreign corporation. In the case of *Old Wayne Mutual Life Association of Indianapolis* v. *McDonough,* 164 Ind. 321, 326-328, the Supreme Court of Indiana had before it the question of enforcing a judgment obtained against an Indiana corporation in the State of Pennsylvania where it was transacting business without complying with the Statutes of the State of Pennsylvania. This court reversed the decision of the Indiana Supreme Court in *Old Wayne Mutual Life Association of Indianapolis* v. *McDonough,* 204 U. S. 8, 21-22, 51 L. Ed. 345, 351, on the grounds that the Indiana Court had erred in recognizing as valid the judgment of the Pennsylvania Court obtained without personal service upon the Indiana corporation but this Court and the Indiana Supreme Court

in the two cited cases recognized that a corporation can have no legal existence beyond the boundaries of the sovereignty which created it which means of course that it can have no legal residence in any other place than in the state of its incorporation. In an earlier decision the Supreme Court of Indiana had previously stated that the residence of a foreign corporation is confined to the state where its principal office or place of business is located and where its entire operations are managed, *The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, et al.* v. *The City of Indianapolis,* 147 Ind. 292, 295-296, cited by petitioner (page 14 of petitioner's brief).

The Supreme Court of Indiana in *The New Albany and Salem R. R. Co.* v. *Haskell,* 11 Ind. 301 cited by the petitioner (page 13 of petitioner's brief) did not have before it the question of residence of a foreign corporation. There the sole question was the residence of a domestic railroad corporation in counties in which it had an office or agent under an Indiana venue act.

III.

Petitioner's Contention That the Decision of the Seventh Circuit Is Contrary to the Weight of Authority of Decisions of State Courts Does Not Constitute Grounds for Certiorari and the Decisions Relied Upon Are Distinguishable.

(Section g, Petitioner's Argument, Pet. Br. PP. 15 to 18.)

Petitioner's statement to the effect that the decision of the Seventh Circuit in the case at bar is contrary to the weight of authority of decisions of several state courts, if sound, does not constitute grounds for review by certiorari under Rule 38 (5) of the Rules of the Supreme Court. The state

court decisions relied upon by the petitioner in support of her argument under this heading are either distinguishable upon the facts or hold that a corporation by transacting business in the state where the case was commenced was amenable to process in that state. This question was not before the Court in the case at bar.

Conclusion.

The petition and brief in support thereof fail to disclose any conflict between the Seventh Circuit's decision in the case at bar and that of any other Circuit Court of Appeals.

There is likewise no conflict with any decision of this Court. To the contrary the Seventh Circuit's decision follows the decisions of this Court in establishing that the residence of a foreign corporation is limited solely to the state of its incorporation. The petitioner has likewise failed to substantiate the assertion that the decision of the Seventh Circuit is in conflict with local decisions or local policies. Again, contrary to petitioner's contention the Seventh Circuit's decision is exactly in accord with such decisions of the Indiana Supreme Court as have touched upon the subject of residence of a foreign corporation although it is recognized that the exact question presented in the case at bar has never been before the Indiana Courts.

There is no question of Federal law involved in the case at bar nor has there been a decision of a Federal question which is in any way in conflict with applicable decisions of this Court. It is further submitted that there is no showing of a departure from the accepted and usual course of judicial proceedings or any sanction of such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

In effect the petitioner merely seeks another hearing and

it is submitted that such relief is not afforded to a litigant by certiorari to this Court.

Magnum Import Co. v. *De Spoturno Coty,* 262 U. S. 159, 67 L. Ed. 922.

There is certainly no special or important reason apparent in this case which should impel this court in the exercise of a sound judicial discretion to award the writ, *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 387, 393, 67 L. Ed. 712.

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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EDITH VANDEVOIR, Petitioner,

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Respondent.

REPLY BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES

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RESPONDENT

REPLY BRIEF OF PETITIONER.

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a.

At page 2 of respondent's brief it is stated:

> "All advertising, ticket selling, loading and unloading of passengers and baggage and general contacts with the travelling public are handled through a separate terminal corporation at Evansville."

This deserves some exemplification. The name (R. 40) of the separate corporation is: Greyhound Terminal of Evansville, Inc.

It is an Indiana corporation. (R. 40).

An official of defendant was asked and gave answer (R. 18) as follows:

"Q. They are your agent there?

A. Yes, sure."

Without this testimony, the activities between respondent and Greyhound Terminal (R. 40-41) made the latter the agent of the former for the transaction of business in Indiana. Department of Treasury v. Ice Service, Inc., 220 Ind. 64 (1942).

The solicitation of business in Indiana was state wide. There were many other agents throughout the state. (R. 25, 40).

On application for its certificate of authority from Indiana respondent asserted itself to be a "public utility within the purview of the Motor Vehicle Act of 1935", the Indiana act. (R. 28) And on that application Indiana issued a certificate of authority to transact business here.

b.

At page 3 of its brief respondent undertakes to set out the second clause of the involved section of the Indiana statute. The first clause and the second clause, as shown in petitioner's brief at page 3, form a single sentence and are separated by a semicolon. This semicolon is followed immediately by the word "but". Respondent omits this word, and then proceeds with argument and asserts the conclusion that "the two clauses are each solely unrelated to the other" and therefore the language used in "one cannot be interpreted in the same sense in which it is used in the other". The significance of the word is discussed by petitioner at page 7 of her brief. It is thought the word earmarks the second clause of the statute

as an exception to the first and thereby supports the contention that the subject matter dealt with is the same in each clause, viz, nonresidence; consistent with the published heading of the statute and the rules of construction mentioned in petitioner's original brief.

c.

Argument is presented to show impracticability in petitioner's interpretation. That it would be impossible to determine what limitation statute would apply where a foreign corporation is sued. That is, if it be held the corporation has residence in more than one state, then on suit in Indiana confusion would arise. The answer is that the foreign corporation which comes to Indiana, as this respondent has, is not a non-resident and Section 2-606 has no application.

If a foreign corporation, not qualified and without process, voluntarily appears to a pending suit, it does so with its eyes open so far as the Indiana limitation statutes are concerned; and can exact only those benefits for which it can qualify.

It is said in 34 American Jurisprudence, Section 50 that:

> "If a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitation is to be preferred."

The Eighth Circuit (Crawford County etc. Bank v. Crawford County, 66 Federal 2d 971, 973) remarks that where the question is doubtful as to the applicable limitation statute the "court will adopt the longer period."

And cites a previous decision of the same circuit (Payne v. Ostrus, 50 Fed. 2d 1039) and a decision of the 10th Circuit (Hughes v. Reed, 46 Fed. 2d 435). The Payne Case carries this language at page 1042:

"Of course if substantial doubt exists, the longer rather than the shorter, period of imitation is to be preferred."

The Hughes Case at page 440 says this:

"Where doubt exists as to the nature of the action, courts lean toward the application of the longer period of limitations."

And cites in support Iowa, Arkansas, Nebraska, Ohio and Oregon Cases.

If any contingency should arise by which a foreign corporation, not qualified in Indiana, should be subjected to jurisdiction and there is doubt as to what limitation statute applies, the above authorities point the way.

d.

We do not understand the Murphree Case (90 L. ed. 207) cited by respondent to support the nonmigration idea which in certain instances furnishes the reason for a declaration that residence cannot be acquired in another state. The court recognizes that corporations migrate. At page 209 it is said:

"By consenting to service of process upon its agent residing in the Southern District, petitioner rendered itself '*present*' there for the purpose of service." (Italics supplied).

Presence could not exist in Mississippi without migration. The word presence is used by Justice Cardozo (Comey, 217 N. Y. 268) in holding a foreign corporation is not a nonresident within the meaning of a limitation statute. In reaching his conclusion this is said:

"Its *presence* here is 'not temporary but continuous' and under the authority of our laws." (Italics supplied).

The Williams Case (90 L. ed. 247) expressly recognizes the reality of corporate migration. At page 249 is this:

> "A corporation chartered by one state commonly does business in the farthest reaches of the nation."

e.

Respondent asserts unimportance of the question presented. Petitioner recognizes the wide discretion in matters of this kind; but in view of the vast corporate activities beyond the chartering state and the conflicts as set out in the original brief, this petitioner believes the uncertainty created by the instant decision should be removed and the nonmigration idea put in its proper place.

Respectfully submitted,

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